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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91223065
Party	Plaintiff PN, LLC
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Attachments	Opposer PN, LLC's Opposition to Applicant's Motion for Reconsideration.pdf(264493 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Application  
No. 86/256,711 for the mark PN (stylized design)  
Application Date: April 18, 2014  
Publication Date: April 7, 2015

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PN, LLC, a Delaware limited liability company	)	
	)	
v.	)	
	)	Opposition No. 91223065
C2 Management Group LLC, a Maryland limited	)	
liability company	)	
Applicant	)	
	)	

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**OPPOSITION TO APPLICANT’S MOTION FOR RECONSIDERATION AND  
CLARIFICATION OF THE BOARD’S DECISION OF SEPTEMBER 30, 2015**

Opposer PN, LLC (“Opposer”) by and through its attorneys, VLP Law Group LLP, respectfully submits this brief in opposition to the motion for reconsideration filed in this proceeding on October 30, 2015 as Motion For Reconsideration And Clarification Of The Board’s Decision Of September 30, 2015 by Applicant C2 Management Group LLC (“Applicant”) identified on the Trademark Trial and Appeal Board docket (11 TTABVUE) as D’s Motion for Reconsideration of Board’s 9/30/15 Order (“Applicant’s Motion”), and served upon Opposer by Applicant via First Class Mail.

Trademark Rule 2.127 (b) provides that a brief in response to a motion for reconsideration

shall be filed within *fifteen days* from the date of service of the request. Trademark Rule 2.119(c), however, provides, whenever a party is required to take some action within a prescribed period after the service of a paper upon the party by another party and the paper is served by first-class mail, 5 days shall be added to the prescribed period. Accordingly, based on the filing date of Applicant's Motion of October 30, 2015 served on Opposer's counsel of record via First Class Mail, this Opposition to Applicant's Motion is timely.

### **INTRODUCTION**

Applicant's Motion is neither supported by current law nor by reasonable arguments for the extension or reversal of current law. The Board did not err in reaching its decision set forth in the Board's order dated September 30, 2015, 9 TTABVUE ("Order"). Rather, it is apparent that Applicant filed its motion for reconsideration merely as a repetition of its prior motion, dated August 6, 2015 ("Denied Motion") in its continuing campaign to delay this proceeding and create additional expense to Opposer, a small business with limited financial resources. This is especially true considering that Applicant's Denied Motion was filed as a motion for reconsideration, which the Board considered and denied in its Order. *See* Denied Motion, 4 TTABVUE at p. 1 and 4; *See* Order, 9 TTABVUE at p. 5 fn. 4.

### **ARGUMENT**

**A. Applicant's second motion for reconsideration should be denied as prohibited under trademark rule 2.127(b).**

1. Applicant's prior motion, the Denied Motion, was filed as a motion for reconsideration and treated as such by the Board in its Order. Order, 9 TTABVUE at p. 5 fn. 4.
2. The Board denied Applicant's prior motion for reconsideration. *Id.*

3. Section 518 of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) provides that a motion for reconsideration under Trademark Rule 2.127(b) does not “contemplate a second request for reconsideration of the same basic issue.” TBMP § 518 (2015) (Motion for Reconsideration of Decision on Motion); 37 CFR § 2.127(b); *See Giant Food, Inc. v. Standard Terry Mills, Inc.*, 231 USPQ 626, 631 n.11 (TTAB 1986); *Avedis Zildjian Co. v. D.G. Baldwin Co.*, 181 USPQ 736, 736 (Comm’r 1974).

4. Applicant’s Motion is a second request for reconsideration of the same basic issue in the Denied Motion and, therefore, should be denied.

**B. Applicant’s Motion should be denied because it simply reargues the same points relied upon in its prior Denied Motion.**

1. Section 518 of the TBMP also provides that a motion for reconsideration under Trademark Rule 2.127(b) “may not properly be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion.” TBMP § 518; 37 CFR § 2.127(b); *See Vignette Corp. v. Marino*, 77 USPQ2d 1408, 1411 (TTAB 2005) (reconsideration denied because Board did not err in considering disputed evidence).

2. Applicant’s Motion relies on the same grounds as its previously denied motion: that the Board lacks jurisdiction because Opposer’s Notice of Opposition was not timely filed and in fact relies upon the identical arguments and precedent from Applicant’s prior motion that failed to persuade the Board. *Compare* Denied Motion, 4 TTABVUE at p. 5, line 4 through p. 7, line 22 *with* 11 TTABVUE at p. 5, line 4 through p. 7, line 14.

3. Applicant filed a reply to Opposer’s opposition to the Denied Motion which recognized Opposer’s factual filings in the record (*See* 8 TTABVUE at p. 2, 3), but Applicant’s Motion now claims

for the first time that Opposer's opposition brief to the Denied Motion "did not provide any such factual or legal grounds" relating to the Board's decision.

4. In fact, Opposer's devoted multiple pages to facts and law in both the body and exhibits to its opposition brief, which like the Order, pointed to the relevant sections of the record in this case, portions of its filed pleadings to support Opposer's standing and web page printouts accessed through the TSDR for the involved application (Application Ser. No. 86256711) showing Applicant had access to notice of the timely filing of both Opposer's request for extension of time to oppose the involved application and the timely filing date of Opposer's Notice of Opposition within the extension period granted.

5. Applicant's claim that Applicant's current Motion is the first opportunity it has had to address the same facts provided in Opposer's brief defies logic and is an attempt to permit Applicant to reargue its previous motion for the purpose of obtaining a different result.

6. Applicant also uses its motion for reconsideration to introduce for the first time, a new claim: that the Board's adoption of its Electronic System for Trademark Trial and Appeals ("ESTTA") is in violation of the Administrative Procedures Act ("APA") and quotes excerpts of definitions from the APA as new evidence of its new claim. *See* 11 TTABVUE at p. 9.

7. Based on the foregoing, Applicant is using its motion for reconsideration to simply re-argue the points presented in its brief on the original Denied Motion and to introduce new evidence and claims to support its original Denied Motion. Applicant's Motion, therefore, should also be denied.

**C. Applicant's unsupported assertions are insufficient to show error in the board's decision or overturn the Board's rules and the ESTTA system applying them.**

1. The USPTO rules governing procedure in inter partes proceedings before the Board are adapted, in large part, from the Federal Rules of Civil Procedure, with modifications due

primarily to the administrative nature of Board proceedings. TBMP §101.01; *Yamaha International Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1004 (Fed. Cir.); TBMP §101.02 (Inter partes proceedings before the Board are also governed by the Federal Rules of Civil Procedure, except as otherwise provided in the Trademark Rules of Practice, and “wherever applicable and appropriate,”).

2. Applicant provides no evidence of clear error by the Board in reaching its decision in the Order based on the rules and procedures of the TTAB as adapted with such administrative modifications, nor injury or prejudice to Applicant by allowing this case to proceed. Instead Applicant asserts, without citation to precedent of the TTAB or The Court of Appeals for the Federal Circuit (“Federal Circuit”) to support its challenge, that the Board’s basis for establishing good cause for an extension of time to oppose is insufficient.

3. Applicant also asserts that the Board’s use of its ESTTA electronic filing system to permit online filing of such requests using a simple statement for good cause that has been established by long standing practice and accepted by parties (both plaintiff and defendant) for years as sufficient, should be struck down and set aside in this case. As noted in Applicant’s Motion, however, to grant Applicant’s motion and retroactively alter the rules to overturn Opposer’s timely filed extension request and Notice of Opposition would deny Opposer its right to substantively challenge Applicant’s application for registration causing unwarranted injury and prejudice to Opposer for simply complying with the rules and practice adopted by the USPTO at the time Opposer filed its extension request.

4. Neither does Applicant provide evidence or legal support for its argument that the choice “The potential opposer needs additional time to confer with counsel” among the limited alternatives in the ESTTA system as reviewed by the Board, is not sufficiently particular or somehow serves as a basis for clear error in the manner upon which the Board reached its decision in the Order.

5. Instead of TTAB or Federal Circuit case law, as support for Applicant’s claim that the statement offered as a basis for good cause in the ESTTA system is insufficient, Applicant cites only to “FRCP 27 (a)(2)”.

Contrary to Applicant’s Motion, the Federal Rule of Civil Procedure cited by Applicant relates only to Depositions to Perpetuate Testimony Before an Action is Filed and not the content of motions:

(2) *Notice and Service*. At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. Fed. R. Civ. P. 27(a)(2).

6. Given the reference “Except as otherwise provided” in TBMP§ 101.02 regarding application of the Federal Rules of Civil Procedure and TBMP § 101.01 and precedent cited above anticipating the prospect of modifications to the federal rules of civil procedure “due primarily to the administrative nature of Board proceedings” consideration must be given to the unique administrative context in which the use of the ESTTA online filing options apply.

7. Since Applicant has speculated on the insufficiency of the ESTTA good cause statement by comparing it to the standards applied in grossly different regulatory contexts (e.g. health care, social security), then Opposer can also consider and argue from practice and experience before the TTAB why such a good cause statement is sufficient in the trademark context in which ESTTA was

adopted.

8. ESTTA supports an ex-parte global online filing process involving a variety of potential opposers, many of whom may be foreign individuals, filing pro-se, and requiring US counsel to explore the distinctions between their country's law and that embodied in US Trademark law and practice, an extension request for up to 90 days would appear reasonable. International communication and translation issues could require substantial time to communicate, comprehend and ultimately make decisions involving international litigants, as well as contemplating the significant investment of time and money in litigation.

9. To reach the level of detail by each potential opposer Applicant speculates should be applied, could wrongly compel a pro se foreign opposer to divulge in the detailed reasons he must "confer with counsel" confidential, trade secret or even attorney-client privileged information from a foreign attorney-client relationship.

10. For example, because of the strict time limits involved in oppositions against Trademark Act § 66 applications, electronic filing is required for extensions of time to oppose and notices of opposition against such applications. See Notice, Madrid Protocol accessed through the ESTTA home page, <http://estta.uspto.gov/docs/help.html#madrid> (emphasis in original). See also ESTTA USERS MANUAL at p. 5, (requests for extensions of time to oppose Madrid Protocol extensions of protection must be filed electronically using ESTTA.) <http://estta.uspto.gov/estta12-usermanual.pdf>.

11. Contrary to Applicant's claim that the Board's adoption of its good cause statements violate the Administrative Procedures Act, the ESTTA home page also provides examples of the Boards history of compliance with rulemaking requirements in the implementation of the ESTTA system, providing notice to users and references to the Federal Register. For example, the ESTTA home



page provides:

## **NEW TTAB RULES IN EFFECT**

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 Fed. Reg. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. As the Board adapts the ESTTA system to accommodate the amended rules, users are urged to review the rules to ensure that attachments to ESTTA submissions meet the requirements of the amended rules. In addition, users must note any warnings posted on ESTTA screens or filing forms that may temporarily restrict their use to cases commenced prior to November 1, 2007, the effective date of many of the amended rules. See ESTTA home page, <http://estta.uspto.gov/>

12. Applicant's proper forum for comments and argument for rule changes suggested in Applicant's Motion should be properly brought in a different time and manner during the rule making process for a rule and not after its enactment during a case, or prior to the implementation of an electronic filing system, not after Applicant has accepted its terms through the filing of its application, including the possibility of challenge under the rules and procedures, including *ex-parte* procedures, established by the tribunal granted the authority to oversee and rule on such challenges.

13. Applicant's assertions, made without citation to precedent showing support for such challenge by decisions of the Federal Circuit or the TTAB, and without regard for the Board's unique administrative process confronting the challenge of a global online filing environment with numerous pro se opposers, are unfounded and unpersuasive, and certainly insufficient to overturn the Board's exercise of its delegated authority to determine good cause. Neither should such unsupported assertions be sufficient to nullify longstanding practice embodied in an efficient and effective online system for processing *ex parte* extension requests that appears to have been acceptable to all who have used it other than Applicant.

## **CONCLUSION**

Wherefore, based on the foregoing, Opposer respectfully requests that Applicant's Motion for Reconsideration And Clarification Of The Board's Decision of September 30, 2015 be denied.

Date: November 19, 2015

Respectfully submitted,

s:/Scott R. Austin/  
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**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that this OPPOSITION TO APPLICANT'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE BOARD'S DECISION OF SEPTEMBER 30, 2015 was filed electronically through the Electronic System for the Trademark Trial and Appeal Board (ESTTA) on this 19th day of November, 2015.

/Scott R. Austin/  
Scott R. Austin  
VLP Law Group LLP

**CERTIFICATE OF MAILING**

I hereby certify that a copy of this OPPOSITION TO APPLICANT'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE BOARD'S DECISION OF SEPTEMBER 30, 2015 is being served on the below opposing counsel/party of record on November 19, 2015, by mailing said copy via First Class Mail, postage prepaid as follows:

SCOTT A. CONWELL, Esq.  
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Date of Mailing: November 19, 2015

Printed Name:           Scott R. Austin

Signature:             \_/Scott R. Austin/\_\_\_\_\_